BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

RELIABLE STORES, INC., Petitioner,	)	
v.	)	PCB 2019-002
	)	(LUST Permit Appeal)
OFFICE OF THE STATE FIRE MARSHAL, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR STAY, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 8th day of July, 2021. The number of pages in the e-mail transmission 13 pages.

RELIABLE STORES, INC.

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR STAY

NOW COMES Petitioner, RELIABLE STORES, INC., by its undersigned counsel, and pursuant to Section 101.500(d) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.500(d)), in opposition to Respondent's Motion for Stay of Petitioner's Motion for Authorization of Payment of Attorney's Fees as Corrective Action, states as follows:

INTRODUCTION

As an initial matter Petitioner wants to make clear that it objects to the timeliness of this motion. The Office of the State Fire Marshal (hereafter "the OSFM") filed a motion seeking an extension of time to file its response to Petitioner's Motion for Authorization of Payment of Attorney's Fees as Corrective Action (hereinafter "Fees Motion"), which included a citation to Section 101.500(d). (Mot. for Extension, ¶7) That provision states in relevant part:

> **Within 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party waives objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. . . . Parties may request that the Board grant more time to respond by filing a motion for extension of time before the response period expires.**

(35 Ill. Adm. § 100.500(d))[1]

The OSFM's prayer for relief requested "fourteen days, up to and including June 24, 2021, to file its response to the Fees Motion." (Mot. Extension, at p. 4) On June 18, 2021, the Hearing Officer granted the motion for extension of time to respond by June 24, 2021.

On June 24, 2021, the OSFM filed Respondent's Motion for Stay of Petitioner's Motion for Authorization of Payment of Attorney's Fees as Corrective Action (hereinafter "Motion for Stay"). It is not a response, it is a motion. Indeed it is a motion seeking not to file a response. As it is a motion, this filing itself is a response.

In summary, the Fees Motion should be granted forthwith, or at least without any expectancy that the OSFM file a response. There is no right to file a response in the Board's Procedural rules, and the OSFM was given permission to file a response by June 24, 2021, which it failed to do. There is no real prejudice here. Any fee award would not be lodged against the OSFM, as the Board's order constitutes a finding that the fees are corrective action costs, just as are environmental consultant's expenses incurred in seeking an eligibility determination. It is not uncommon for the State to not file a response opposing such motion e.g., Abel Investments v. IEPA, PCB 16-108 (March 2, 2017), and the Board has personal knowledge about the nature of the litigation before it. Finally, even when attorney fees are to be awarded against the opposing party, "[a] request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). There is no just reason to delay ruling on the Fees Motion.

[1] Essentially, the Motion for Extension of Time was twofold in nature: First, it requested an extension the deadline to file an extension of time pursuant to 35 Ill. Adm. Code 105.522 (Mot. for Extension, ¶8); and second, it requested the extension of time itself pursuant to 35 Ill. Adm. Code 105.500(d) (Mot. for Extension, ¶7)

Legal Standard for Order of Stay

Whether or not to grant a stay pending an appeal is a matter entrusted to the discretion of the Board. Phillips 66 Company v. IEPA, PCB 12-101 (Aug. 8, 2013). Since at least 2009, the Board's analysis has been framed by the Illinois Supreme Court opinion in Stacke v. Bates, 138 Ill.2d 295 (1990). See People v. Community Landfill Co., PCB 03-191, slip op. at 4 (Nov. 5, 2009). Under this analysis, the movant must present a substantial case on the merits and show the balance of equities weigh in favor of the stay:

> **The granting of a stay pending appeal is preventive or protective and seeks to maintain the status quo pending appeal.** ***We believe that in all cases, the movant although not required to show a probability of success on the merits, must, nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay.*** **If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing on the merits. Thus, a strong showing of the likelihood of success on the merits may offset other equitable factors favoring the other party.**

Stacke, 138 Ill.2d at 309 (emphasis added).

The equitable factors that should be considered include "whether the status quo should be preserved, the respective rights of the litigants, and whether hardship on other parties would be imposed." Community Landfill Co., PCB 03-191, slip op. at 3 (Nov. 5, 2009)[2]

Finally, the Board's denial of a motion for stay does not preclude movant from applying to the appellate court for a stay. Id. at 4.

[2] An additional consideration listed in Community Landfill Company is "whether a stay is necessary to secure the fruits of the appeal in the event that the movant is successful." While this language is taken from the Stacke opinion, it merely appears to be a restatement of the analysis of "whether the status quo should be preserved." See Stacke, 138 Ill.2d at 305.

I. THE OSFM HAS NOT SHOWN THAT GROUNDS EXIST FOR A STAY.

On April 1, 2021, the Board entered judgment in this matter, finding that the OSFM had erred in denying Petitioner eligibility to the Underground Storage Tank Fund and directing OSFM on remand to determine the associated deductible when it issues the Eligibility and Deductibility determination letter (hereinafter "E&D Letter"). While the deductible is readily ascertainable based on the undisputed facts in the record,[3] the Board properly understood that the issue of the deductible was not before it and the administrative task of issuing the E&D Letter ultimately belongs to the OSFM. Of course, the case is not upon remand, but has been appealed. However, it is important to recognize that had the case been remanded, Petitioner's request for a finding that its legal costs were corrective action would have had no impact on the OSFM on remand. OSFM has an important role in administering access to the LUST Program, but issues regarding corrective action are the responsibility of the Illinois EPA.

A. The OSFM Has Not Shown a Substantial Case on the Merits.

The likelihood of success on the merits is a very important consideration under the Stacke analysis, although not determinative. The weaker the movant's case for success, the stronger equitable factors must weigh in its favor to prevail. Stacke, 138 Ill.2d at 309. The motion makes two claims: the OSFM has appealed the Board's decision in good faith and the OSFM was following thirty years of its policy. These are self-serving conclusions, the latter of which is a claim that the OSFM is violating the Administrative Procedures Act by enforcing an unpromulgated rule. (5 ILCS 100/1-70)

[3] Releases reported after June 8, 2010 are subject to a $5,000.00 deductible. (415 ILCS 5/57.9(b)(3))

Admittedly, the likelihood of success will be a difficult case to be made before the body the movant is appealing from, but there are judgments in which dissents are filed, or a final decision ignores the applicability of a change in the law or controlling precedent (though the latter can be identified and addressed through a motion for reconsideration). Ultimately, the only conclusion that the Board can draw is that the movant can not make a "substantial case on the merits," just a respectful disagreement with the Board's unanimous decision.

B. The Status Quo is not Altered by Ruling on the Fees Motion.

The Board's decision ordered the OSFM to issue an eligibility determination upon remand. Nothing in the Fees Motion impacts the OSFM's obligation. The OSFM is concerned that it won't be able to recover any legal fees the Board directs the OSFM to pay. This is a complete misunderstanding of the Fees Motion and the Leaking Underground Storage Tank Program. The prayer for relief in the Fees Motion expressly "requests that the Board authorize payment from the Leaking Underground Storage Tank Fund the amount of $15,900.00." (Fees Motion, p. 5 (emphasis added) The motion was brought pursuant to 415 ILCS 5/57.8(l), which authorizes the Board to find that the legal costs are "corrective action costs," (415 ILCS 5/57.8(l)), and corrective actions costs are paid from that Fund. (415 ILCS 5/57.11(a)(5)) The Board simply has no authority to direct the OSFM to pay legal fees as the OSFM asserts, nor was such a request was made. Therefore, the OSFM has failed to show that a stay is necessary to secure the fruits of the appeal in the event the movant is successful.[4]

[4] The OSFM's citation to Globalcom v. Illinois Commerce Commission, 347 Ill. App. 3d 592 (1st Dist. 2004) also raises an entirely irrelevant consideration. That case solely involves situations in which a party has prevailed on some, but not all claims. Id. at 618. In such cases, the Board has sometimes awarded legal fees in proportion to success. E.g., Piasa Motor Fuels v. IEPA, PCB 18-54 (Nov. 5, 2020) (Board awarding 7 percent of legal fees when only successful

C. The Movant Fails to Demonstrate that Petitioner Will Not Be Prejudiced.

The respective rights of the litigants should be considered, particularly the likelihood that the respondent will suffer hardship. Stacke, 138 Ill.2d at 307-308. Initially, it should be recognized that Petitioner had 35 days from the Board's final judgment to file its Fee Motion or be precluded from doing so. See Illinois Ayers v. IEPA, PCB 03-214 (June 16, 2004). While the appeal was filed while Petitioner was in the process of preparing the Fees Motion, the Board's precedent in this area clearly compelled Petitioner to submit a full accounting of legal costs incurred in the litigation, along with the type of supporting information necessary for the Board to award the fees. Petitioner is prejudiced by the OSFM's failure to file a response by the June 24, 2021 deadline, to allow the Board to make the necessary finding while the matter is fresh in the minds of all. As stated in the introduction, attorney fee petitions are not supposed to produce a second litigation, and a well-documented fee petition will hopefully reduce the need for any objection to be filed at all.

Indeed, legal fees are awarded as corrective action costs without the need for litigation, so long as those legal costs or not "legal defense costs." City of Roodhouse v. IEPA, PCB 92-31, slip op. at 19 (Sept. 17, 1992). The purpose of having the Board make the finding that these legal defense costs were necessary and reasonable is because the Board and other parties have direct familiarity with the proceedings to provide information that the Illinois EPA generally lacks in cases like City of Roodhouse. That purpose is impeded by an indefinite delay during which time the people involved in the litigation may no longer be available.

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in reversing seven percent of the $13,046.45 in costs at issue). Petitioner herein prevailed as to its eligibility, which unlike cost claims is not subject to partial success.

Petitioner is also prejudiced by the assumption that once the appeal is completed, the matter can be taken up again. This does not appear to be an assumption that can be made with anything approximating certainty given the complex procedural rules involving appeals. "For the trial advocate, appellate jurisdiction is akin to strolling through a minefield." Physicians Ins. Exchange v. Jennings, 316 Ill. App. 3d 443, 446 (1st Dist. 2000). For example, in the case of Prime Location Properties v. IEPA, PCB 09-67 (Nov. 15, 2012), the Board denied petitioner's post-mandate request for attorney fees incurred defending the Board's decision before the Appellate Court's because the mandate did not expressly direct the Board to do so. Here, where the attorney fee issue is not a matter before the Appellate Court, a similar risk is certainly possible. Therefore, there is a real prejudice that a stay could defeat the Fees Motion even if the Board assumes that it can be considered after the appeal is completed.

D. The OSFM Has Not Shown the Stay Will Not Pose a Threat to Human Health and the Environment.

The original purpose of the LUST Fund was to satisfy the need for financial responsibility to cleanup underground storage tank releases and injuries to third-parties. (415 ILCS 5/57(3)) The scope of these harms can be significant as demonstrated by the $1,500,000 in coverage limits separately for corrective action costs and third-party indemnification. (415 ILCS 5/57.8(g)) While eligibility is limited to owners and operators, the beneficiaries of such financial assurance include neighbors, future owners, local governments. Moreover, the existence of financial responsibility governed by promulgated rules and opportunity for hearing provides assurance to owner/operators and the consultants and lawyers they hire that they will ultimately be paid for the

work performed.

The Board has never considered financial assurance requirements to be a mere paper requirement, the absence of which poses no threat to human health or the environment. In fact, the Board has expressly refused to issue stays pending appeal from financial assurance requirements. People v. Community Landfill Co., PCB 03-191 (Nov. 5, 2009). While it is true that the OSFM seeks to stay adjudication of the Fees Motion, not the financial assurance requirement directly, it is also unquestionably true that by avoiding issuance of the E&D Letter it is blocking performance of remediation under the Leaking Underground Storage Tank Program. The OSFM may feel justified in believing it is defending its thirty-year unwritten rule, but there is no basis for the Board to believe the OSFM's conclussory assertion that no harm to the environment is presented — the OSFM simply does not know or care.

II. THE BOARD HAS JURISDICTION OVER THE FEES MOTION BECAUSE IT IS COLLATERAL OR INCIDENTAL TO THE JUDGMENT.

"Although the Appellate Court acquired jurisdiction of this case once a notice of appeal was filed with the court, the Board retains jurisdiction to determine 'matters collateral or incidental to the judgment.'" People v. Toyal, Inc., PCB 00-211, slip op. at 4 (Sept. 16, 2010) (quoting Sears Holding Corp. v. Pappas, 391 Ill. App. 3d 147, 158-59 (1st Dist. 2009). This legal principle is cited in several decisions in the subject motion. See Id.; People v. AET Envtl., Inc., PCB 07-95 (June 20, 2013), slip op. at 4; People v. Community Landfill Co., PCB 03-191, slip op. at 4 (Nov. 5, 2009). However, the OSFM does not explain how the Fees Motion is not "collateral or incidental" to the judgment on appeal.

As the Illinois Supreme Court has explained:

> **A notice of appeal is a procedural device filed with the trial court that, when timely filed, vests jurisdiction in the appellate court in order to permit review of the judgment such that it may be affirmed, reversed, or modified. Once the notice of appeal is filed, the appellate court's jurisdiction attaches *instanter*, and the cause of action is beyond the jurisdiction of the circuit court. The circuit court, however, retains jurisdiction after the notice of appeal is filed to determine matters collateral or incidental to the judgment. This court has specifically recognized that a stay of judgment is collateral to the judgment and does not affect or alter the issues on appeal.**

Gen. Motors Corp.. v. Pappas, 242 Ill.2d 163, 173-174 (2011) (citations omitted).

In supporting this explanation, the Illinois Supreme Court favorably pointed to precedent holding that a "notice of appeal from final judgment in condemnation suit did not divest trial court of jurisdiction to hear petition for fees and costs." Id. (citing Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co., 157 Ill.2d 282, 289–90 (1993))

"The filing of a motion for attorney fees after a judgment in the principal action is an incidental or collateral matter; it is not a motion attacking the judgment and therefore does not affect the judgment appealed from nor nullify an earlier notice of appeal." Brotherhood Mut. Ins. Co. v. Roseth, 177 Ill.App.3d 443, 448 (1st Dist. 1988). However, the motion must be timely filed. Herlehy v. Marie, 407 Ill.App.3d 878, 898-899 (1st Dist. 2010)("A circuit court has jurisdiction to entertain a motion for attorney fees filed within 30 days of the entry of a final judgment without regard to a previously filed notice of appeal.")

Here, the Fees Motion was timely filed. Illinois Ayers v. IEPA, PCB 03-214 (June 16, 2004) (holding that fee motion must be filed within 35 days of final judgment). The Fees Motion does not attack or seek to modify the final judgment, nor does it demand anything of the OSFM. If the Fees Motion is granted, the OSFM will not be impacted in any sense, nor would it impact

the Appellate Court's review of the judgment. Implicit in a lower tribunal's power to issue a stay pending appeal is that there are proceedings that may continue during the pendency of the appeal which might be properly subject of a stay. Yet, the OSFM claims a mechanistic approach that automatically divests the Board of jurisdiction and without recognizing the legal distinctions that arise once a notice of appeal is filed as opposed to after the Appellate Court reaches a decision.

The cases relied upon by the OSFM are inapposite. In Prime Location Properties, LLC v. IEPA, PCB 09-67 (Nov. 15, 2012), the Board denied a post-mandate motion for attorney fees, in which the mandate was silent as to any further action. Id. at 7. Post-mandate process is governed by Illinois Supreme Court Rule 369, and has no applicability here. In contrast to Prime Location Properties, attorney fees were awarded for the entire litigation after the owner/operator prevailed before the Appellate Court because the mandate was not silent. Estate of Slightom v. IEPA, PCB 11-25, slip op. at (Nov. 5, 2015). Both cases involve post-appeal matters that are not relevant here, but point to the issues that arise post-mandate.

In People v. Skokie Valley Asphalt, PCB 96-98, the respondent filed an appeal of a non-final Board order entered on September 2, 2004, which included a finding that attorney fees should be awarded against the violator in an amount to be determined. During the same time that the respondent was seeking a stay pending an appeal, the Pollution Control Board had filed a motion to dismiss the appeal of a non-final order. See PCB 96-98, slip op. at 4 (Nov. 1, 2007). On November 18, 2004, the Appellate Court granted the Board's motion to dismiss the appeal for lack of jurisdiction to review a non-final Board order. Id. In other words, the respondent sought a stay of a judgment that the Board was asserting to the Appellate Court was not yet final. Furthermore, the respondent's liability to the State for attorney fees was before the Appellate

Court, assuming the judgment was final. Under those circumstances, it would be difficult for the Board to refuse to enter a stay, either because it would be inconsistent with its position on appeal (the Board's order imposes no obligations yet) or because the scope and nature of the judgment for attorney's fees were before the Appellate Court. Moreover, the Board had good reason to anticipate that the stay would last a matter of several weeks.

The filing of a notice of appeal did not remove the Pollution Control Board's jurisdiction to determine matters collateral or incidental to the judgment. Had it mechanistically done so, there would be no need for motions to stay pending appeal because there would be never be any jurisdiction to take any action pending appeal. The motion does not explain how this attorney fee petition would interfere with the Appellate Court's judgment, and of course, the OSFM can seek a stay from the Appellate Court if the Board denies a stay.

CONCLUSION

The Motion for Stay failed to show a substantial case for prevailing on the merits before the Appellate Court, which shifts a greater burden to prove equitable factors, but none of the equities favor a stay. In particular, the purpose of a stay is to protect the status quo, and the OSFM merely wants a stay to avoid having to pay legal defense costs, which is not a legally possible outcome from granting the Fees Motion. The Board typically denies stays where cases are before the appellate court, and has certainly done so with respect to financial assurance requirements . See People v. Community Landfill Co., PCB 03-191, slip op. at 3 (Nov. 5, 2009). Because the Fees motion is collateral or incidental to the judgment, the Board has jurisdiction to rule upon it without further delay as the criteria for a stay have not been met.

WHEREFORE, Petitioner, RELIABLE STORES, INC., requests that the stay be denied and the Board authorize payment from the Leaking Underground Storage Tank Fund the amount of $15,900.00 in attorney's fees and litigation costs pursuant to 415 ILCS 5/57.8(l), and such other and further relief as the Board deems meet and just.

Respectfully submitted,

RELIABLE STORES, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
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